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**Issue Date: 23 September 2003**

CASE NO.: 2001-ERA-00043

In the Matter of

**DENNIS DOHERTY**
Complainant

v.

**HAYWARD TYLER, INC.**
Respondent

Appearances:

Edwin L. Hobson, Esquire, Burlington,
Vermont, for the Complainant

Mark H. Scribner, Esquire (Carroll & Scribner)
Burlington, Vermont, for the Respondent

Before: Daniel F. Sutton
Administrative Law Judge

## DECISION, PRELIMINARY ORDER AND RECOMMENDED FINAL ORDER

### I. Statement of the Case

This case arises from a complaint filed by Dennis Doherty against Hayward Tyler, Inc. pursuant to Section 211 of the Energy Reorganization Act of 1974 ("ERA"), as amended, 42 U.S.C. § 5851 (2000), and the implementing regulations found at 29 C.F.R. Part 24 (2000). The ERA, in pertinent part, provides that "[n]o employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee" notifies a covered employer about an alleged violation of the ERA or the Atomic Energy Act ("AEA"), 42 U.S.C. § 2011 *et seq.* (2000), refuses to engage in a practice made unlawful by the ERA or AEA, testifies regarding provisions or proposed provisions of the ERA or AEA, or commences, causes to be commenced or testifies, assists or participates in a proceeding under the ERA or AEA." 42 U.S.C. § 5851(a)(1) (2000).

Doherty filed his complaint on January 10, 2001, alleging that the Respondent terminated his employment in violation of the ERA. ALJX 1.[1] After an investigation, the Area Director for the Occupational Safety and Health Administration ("OSHA") issued the Secretary's Findings on August 29, 2001 that the evidence showed that Doherty was regularly involved in protected activity, but that the burden of establishing that he was discriminated against could not be sustained. ALJX 1. Doherty appealed the Secretary's Findings and requested a hearing before an administrative law judge in a letter which was received by the Office of Administrative Law Judges on September 18, 2001. ALJX 2.

Pursuant to notice, a hearing was conducted before me in Burlington, Vermont, on September 16 through 20, 2002, at which time the parties were afforded an opportunity to present evidence and argument. An appearance was made by counsel on behalf of the Complainant and the Respondent. Testimony was elicited at the hearing from Doherty and Duncan A. Winton, James Blanchard, David Demar, Robert Bancroft, and Luke Talbot, for the Complainant and from Douglas Roszman, Joel Kynoch, Eric La Rock, Bonnie Hale, Mark O'Bryan, and Dennis Smith, for the Respondent. All witnesses with the exceptions of Doherty and Dennis Smith who was permitted to assist Hayward Tyler's attorney were sequestered on the Complainant's unopposed motion. TR 9. Documentary evidence was admitted as ALJX 1-34, CX 1-6, 8-15, 18, 21-33, 35-36, 38 and RX 1–28, 30-35. CX 22 was admitted for the limited purpose of rebutting that any inference or suggestion that Doherty failed to report income from self-employment from the year 2000 to the state unemployment compensation agency. TR 598-599. Doherty objected to Respondent's Exhibit RX 2 as hearsay evidence, and I admitted RX 2 for the limited purpose of showing how it influenced the Respondent's state of mind at pertinent or relevant times in this matter. TR 153-156. Taken under advisement at the hearing was Hayward Tyler's objection to three pages of CX 20 which contains excerpts from a transcript of Doherty's testimony at a pre-hearing deposition which Doherty offered to rebut Hayward Tyler's claim that he had recently fabricated certain testimony given at the hearing. TR 738-739. Upon further review of this issue, I find that the three pages to which Hayward Tyler objects are admissible as a prior statement that is consistent with Doherty's testimony at the hearing and offered for the purpose of rebutting an express or implied charge of recent fabrication or improper influence or motive. *See* 29 C.F.R. § 18.801(d)(1)(ii). Accordingly, CX 20 has been admitted in its entirety.[2]

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[1] The documentary evidence admitted to the record will be referred to as "ALJX" for jurisdictional and procedural documents admitted by the Administrative Law Judge, "CX" for documents offered by the Complainant, and "RX" for documents offered by the Respondent. References to the hearing transcript will be designated as "TR".

[2] The excerpts from Doherty's pre-hearing deposition, at which Hayward Tyler was represented by counsel and thus had an opportunity for cross-examination, contain Doherty's testimony in response to questions regarding his use of measurement instruments that had not been properly calibrated in accordance with Hayward Tyler's quality assurance policies. While

The record was held open at the close of the hearing for the parties to offer additional evidence and written closing argument. Within the time allowed, Doherty filed a motion to admit the following additional evidence: (1) copies of his 1999, 2000 and 2001 income tax returns as CX 39-41; (2) the transcript of his testimony at a post-hearing deposition take on October 10, 2002 which is marked for identification as CX 42; and (3) the transcript of the deposition testimony of Louis Truso which was also taken on October 10, 2002 and which has been marked for identification as CX 43. Hayward Tyler has not objected to CX 43 which has been admitted into evidence. It does object to the remainder of Doherty's post-hearing evidence, the admissibility of which will be addressed below. The parties filed helpful briefs, and the record is now closed.

Upon careful consideration of the entire record, including the arguments advanced by the parties, I conclude that the Complainant has established that Hayward Tyler terminated his employment in violation of the ERA. To remedy this violation, I will award him reinstatement, back pay with interest and attorney's fees. My findings of fact and conclusions of law are set forth below.

## II. Summary of the Evidence

A. Background

The material facts are largely not in dispute. Where there are conflicts in the evidence relevant to a determination of the legal issues, they are noted below. The Complainant, Dennis M. Doherty, was employed as a quality control inspector for Hayward Tyler, Inc., the Respondent, a company that manufactures commercial pumps and motors, primarily for the nuclear and commercial power industries, located in Colchester, Vermont, beginning in December 1998. TR 232-234; 607. Prior to being hired by Hayward Tyler, Doherty worked in quality control at General Electric where he inspected machine parts used in the aerospace and defense industry for about eight years. TR. 232-233. Doherty's job at Hayward Tyler involved dimensional inspection of parts purchased from vendors and parts fabricated on the shop floor at Hayward Tyler, as well as source inspection at outside vendor sites. TR. 233-234, 237. In performing his job, he reviewed parts for compliance with print requirements and noted any

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Hayward Tyler assented to the admission of most of the excerpts, it objected to three pages on the ground that Doherty's testimony contained therein exceeded the scope of the matters on which he was cross-examined at the hearing. TR 738. The disputed deposition testimony contains Doherty's statements about Hayward Tyler's calibration procedures and records as well as his statement that he was instructed by Doug Roszman, Hayward Tyler's quality assurance manager, to use out-of-calibration instruments. Review of the hearing transcript shows that Doherty testified and was specifically cross-examined about these statements at the hearing. TR 442-445, 45-452. Since Doherty testified about these statements at the hearing and was subject to cross-examination, the challenged deposition testimony is admissible as a non-hearsay prior witness statement within the meaning of Rule 18.801(d)(1).

defects on non-conformance reports ("NCRs") for nuclear or safety-related parts, and inspection reports ("IRs") for industrial-related parts. TR 235-238; 612. Doherty reported directly to Duncan Winton, the quality control supervisor, until some time in June 2000, when Winton was laid off due to a reduction-in-force. Thereafter, he reported directly to Doug Roszman, quality assurance manager and an employee of Hayward Tyler since 1978. TR 236, 606-607. While working for Hayward Tyler, Doherty testified that he received two raises – a one dollar per hour raise after about four or five months and then a fifty cent merit raise in approximately March of 1999. TR 365-366.[3]

As a quality control inspector, Doherty regularly used measuring instruments such as micrometers to determine whether components he inspected met required specifications. Under Hayward Tyler's quality assurance requirements, these instruments are required to be periodically checked or recalibrated by an independent calibration vendor on Hayward Tyler's approved vendor list ("AVL"). At the hearing, Winton and Roszman provided sharply conflicting testimony about the calibration system and whether, as Winton maintained, recalibration dates for several instruments were extended or missed pursuant to Roszman's instructions in late 1999 that Winton not send out instruments for recalibration due to cash flow constraints. Doherty testified that he had no assigned responsibility for calibration with the exception of a few instruments that he checked under Winton's direct supervision. TR 369-370. He also testified that he was instructed by Roszman after Winton was laid off to do the best that he could with instruments that were past due for recalibration. Roszman denied that he ever had any discussion with Doherty about calibration or that he ever told either Winton or Doherty to use instruments that were past the recalibration date. TR 686-688.

B. The December 1999 "John Crane" Incident

It is undisputed that one of Doherty's responsibilities at Hayward Tyler was to inspect component parts supplied by outside vendors for use in Hayward Tyler products and to accept or "receive" parts on behalf of Hayward Tyler if he determined that the parts had been manufactured in accordance with NRC and Hayward Tyler requirements and specifications. TR 649. Part of this responsibility included making sure that purchased parts were accompanied by required documentation, certifying that the parts were manufactured in accordance with applicable nuclear or safety-related specifications, and obtaining documentation when it was missing. TR 650, 825. In December 1999, Doherty questioned whether a shipment of parts from a vendor, John Crane, were accompanied by certified material test reports (CMTRs) which he believed to be required by NRC regulations and Hayward Tyler quality assurance directives and Hayward Tyler's purchase order for the items. Winton, Doherty's former supervisor, testified that it was Doherty's responsibility to seek CMTRs when he believed that they were required; TR 82, 85, 88; and Roszman agreed that Winton could have properly delegated that authority to Doherty. TR 825-826. In addition, Louis Turso, who was Hayward Tyler's senior purchasing buyer until his

[3] Roszman testified that he actually gave this second raise in February 2000 because there were no problems with Doherty's performance. TR 831.

retirement in May 2000, testified that CMTRs are required for some purchased parts and that Doherty had authority to call a vendor directly and speak "QA to QA" in order to obtain missing documentation or correct deficient documentation. CX 43 at 7-8.

On December 10, 1999, Doherty sent the following e-mail message to Roszman regarding the issue:

> Doug, the parts are not marked per 5a. They must be marked per the spec! If John Crane has cmtrs on file, they can be faxed to us. WE PAID 400.00 TO JOHN CRANE FOR A CERTIFICATION CHARGE. THEY HAVE NOT COMPLIED WITH THE PO REQUIREMENTS. IF THEY ARE NOT NEEDED HAVE THEM REMOVED FROM THE PO, AND HAVE LOWER PRICE PART. WE CAN PASS THE SAVINGS ALONG TO OUR CUSTOMERS, OR HAVE MORE PROFIT. AS THE PURCHASE ORDER STANDS NOW, I CAN'T ACCEPT THE PARTS AND SEND TO STOCK.

CX 28 (upper case in original). That same day, Roszman responded by e-mail that the parts could be received, stating,

> We and Crane have traceability.
>
> In regards to the CMTR, para 6a, Crane will have that in their files. We need to keep in mind that we're buying a completed assembly.
>
> Does that make sence [sic] or no

CX 28. Doherty disagreed with Roszman's assessment, and Roszman informed him that the parts order had been done properly and that Hayward Tyler had been doing business with this particular vendor in the same manner for approximately 25 years. TR 636. According to Roszman, he told Doherty that if he persisted in disagreeing, he could take the matter up with Hayward Tyler's general manager or he could choose to write up a NCR. RX 1 at 1. Doherty testified that Roszman was agitated during this conversation, slapping a table with his hand and referring to Doherty's concerns as "bullshit". TR 241. Doherty said that he left the area to let things cool off and was told by Roszman upon his return that if he disagreed with Roszman's instruction that he receive the parts, he could go to company president Dennis Smith or write up a NCR. Doherty also said that Roszman then left and, on the way out, poked him in the chest with a file and warned, "Don't you ever walk away from me again." TR 242.

Doherty testified that he decided to accept the parts and to contact John Crane to obtain the CMTRs which Roszman had said would be on file. TR 242. However, when he contacted John Crane and asked for the CMTRs, he was told by a John Crane quality engineer that they did not have the CMTRs on file for the parts in question. TR 243. Based on this information, Doherty wrote a NCR, declining to accept the parts (RX 1 at 2), and he put the parts on the

"quarantine" shelf. TR 243. A few days later, Winton instructed him to go to personnel where he received the following written warning from Roszman:

> On Friday the 10th, you questioned the acceptability of certifications received from our vendor John Crane on P0 100173. Upon investigation, I sent you an e-mail stating that what was received was acceptable and to receive the part. On Monday, upon finding out that it still was not received, I attempted to discuss these requirements with you and explain why this was acceptable so that future situations were not going to be a problem. You chose to argue with me rather than listen to what my 25 years of experience had taught me. You were advised that per our QA program, if you had a problem with my position that the General Manager had the final say and that you were to take it up with him. You were also advised, that you could choose to write it up on an NCR for disposition.
>
> Instead of either of those actions, you wrote up an NCR indicating that you contacted James Mitchell and he told you that the order was not processed to 10 CFR 21 requirements and that no cmtr's (traceability) existed. This implied that John Crane now falsified records and would create a possible reporting incident. This required me to immediately contact John Crane's Quality Assurance Manager. He has investigated this matter thoroughly within their organization and has reconfirmed that the documentation required and provided, is accurate. The order meets 10 CFR 21 requirements.
>
> Your actions have caused both John Crane and HTI an unnecessary expenditure of manpower. You also impinged [sic] the integrity of another company's long term employee.
>
> Another incident of this nature will result in time off.

RX 1 at 1. Doherty said that he was "stunned" to receive the warning and attempted to ask what he had falsified but was rebuffed by Roszman who told him, "Don't go there. Don't go there." TR 244. He testified that he did not change his practice of contacting vendors to obtain missing documentation after receiving this warning and was not instructed to do so. TR 346-347.

At the hearing, Roszman testified that he considered Doherty's actions inappropriate in that Doherty lacked sufficient understanding of John Crane's documentation procedures to ask "relevant" questions, and as a result of his ignorance, obtained inaccurate information from the vendor's representative. TR 637. Roszman said that he contacted John Crane's quality assurance manager after Doherty wrote the NCR and, contrary to what Doherty had been told, confirmed that the parts had been processed in accordance with NRC and Hayward Tyler requirements and were, therefore, acceptable. TR 638; RX 1 at 2. Roszman testified that Doherty had mistakenly believed that certified material test reports (CMTRs) were required for the parts supplied by the vendor, and he identified provisions in Hayward Tyler's Quality Assurance requirements and a

subsequent NRC report which indicate that CMTRs are not required for the parts that Doherty had questioned. TR 639-642. Roszman said that this incident created problems with a long-term vendor and that he viewed Doherty's actions in contacting the vendor, instead of resolving his questions within Hayward Tyler, as inappropriate and deserving of disciplinary action. TR 638. However, on cross-examination, Roszman conceded that Doherty had not falsified anything and that he did not have any reason to believe that Doherty's conduct was anything other than a sincere effort to determine whether the parts complied with applicable requirements. TR 830-831.

Roszman subsequently sent an email message to Doherty and Winton on April 28, 2000 in which he stated that he wanted to "revide slightly" how NCRs and IRs were being used. RX 16. In this e-mail, Roszman stated that "paperwork" should be generated only in situations where a repair of significant rework and that parts requiring rework that can be expected to be done quickly should simply be sent back for rework without any additional paperwork. *Id*.

C. Doherty's Concerns about the Qualifications of the Level 2 Examiner

In June of 2000, the company's level 2 visual and liquid penetrant ("LP") welding examiner, Dennis Provencher was discharged. The level 2 examiner conducts non-destructive examinations in-house and is trained and approved by a level 3 examiner who reviews and approves procedures and is typically employed off-site. Doherty and Winton raised concerns with Roszman about who would be performing the welding inspections previously done by Provencher. These inspections were required in order to comply with the company's Quality Assurance Manual and Quality Implementation Procedures ("QIPs"). On June 20, 2000, Winton addressed a note to Roszman, asking who would be performing the welding inspections, and Roszman responded that both Winton and Doherty were both qualified to perform the inspections. CX 8. It is undisputed that Doherty and Winton disagreed with Roszman's position that they were qualified to perform welding inspections as level 2 examiners.

After Winton was laid off in the latter part of June, Doherty continued to express concerns about who was qualified to conduct the welding inspections. On June 26, 2000, Roszman sent a memorandum to Dennis Smith, Hayward Tyler's president and general manager, requesting that Smith certify him as a visual welding examiner, and Smith certified Rozman as a level 2 examiner on June 27, 2000. RX 28. Doherty believed that Roszman lacked the qualifications to be certified as a level 2 examiner, and on June 27, 2000, he sent an e-mail message to Mark O'Bryan, Hayward Tyler's manufacturing manager, with copies to Roszman and Smith, inquiring who would be conducting welding examinations. CX 17. Roszman responded by e-mail later that day that they had discussed the examinations previously and that Doherty had been advised of the plan. *Id.* That afternoon, Doherty sent the following e-mail to Roszman:

> Doug,
> On Monday, June 26th, I told you that we needed someone to do visual inspection.
> Your response was that visual inspection was simple and you were getting up to

> speed by reading books and manuals. You also informed me that you would have Dennis Smith certify you for level 2, and then you would train me and certify me. In reading QIP 11, this would not be allowed as you must train under a certified individual. To the best of my knowledge we do not have a certified person on site. My e-mail to Mark O'Bryan suggested that he read QAS 4. The reason for this suggestion is because section 8.1 clearly states what the examiner must do prior to welding. The sections following 8.1 are also clear in the requirements for additional visual inspection.
>
> We do not have anybody doing this at this time. This could give HTI considerable exposure if we proceed on a N or S job without an examiner.
> Dennis Doherty

CX 17. Doherty did not recall receiving any detailed response to this message, but he did remember being called to Smith's office on June 29, 2000 and being asked by Smith why he had caused a "stink" about the welding examinations. TR 378-380. He testified that he spread out the documents that he had reviewed, and Smith responded that he and Roszman had the examination problem "covered" as Roszman would do home study and then be certified by Smith as an examiner, and Hayward Tyler would hire an outside source to serve as the level 3 examiner. TR 378. On July 13, 2000, Doherty sent an e-mail message to Smith, again expressing concerns about the visual welding examinations, and Smith issued the following response on July 18, 2000:

> During our meeting, I told you that any concerns that you have regarding whether or not we are meeting ASME Code requirements or the requirements of our own Q.A. system should be brought to Doug's attention, since he is the Q.A. Manager. If you are not satisfied with the answer or explanation you should address them to me. I told you that if you still have concerns at that point you should talk to Luke Talbot if they involve ASME Code requirements, since he is our Authorized Nuclear Inspector and responsible to insure that we comply with ASME Code requirements where applicable. We have no intention of ever violating ASME Code requirements and want our employees to understand that they should bring up any concerns they have until they are satisfied because nobody is infallible and we could all misinterpret some requirement.
>
> I assume that since you talked to Luke you still had some concern or question, but I am not sure just what it is. I believe that there is no question that Doug is qualified as a Level II Visual Examiner and that Walt Sperko is qualified as a Level III Visual Examiner. Is that still the question that you had or am I missing the question? What was Luke's response to your concern(s). I haven't heard that he has brought up any concerns to us as a result of your conversation with him, but I will check with Doug.

CX 9. Doherty did, as suggested by Smith, speak with Luke Talbot, the Authorized Nuclear Inspector ("ANI"), who is employed by Factory Mutual Insurance to perform independent third party inspections at sites where nuclear components are fabricated, including Hayward Tyler, to ensure compliance with American Society Mechanical Engineers ("ASME") Code standards. Talbot, who I find to be a particularly credible and unbiased witness, testified that Provencher was Hayward Tyler's level 2 visual and LP examiner as well as the welding supervisor and that he raised a concern with Roszman that Hayward Tyler did not have anyone qualified to do the level 2 examinations after Provencher was terminated. TR 523, 525. Talbot further testified that after he learned of Roszman's appointment as Hayward Tyler's level 2 visual examiner, Doherty spoke to him about his concern over whether Roszman met Hayward Tyler's qualification requirements. TR 531-532, 571. Talbot stated that he understood Doherty's concerns and considered them to be legitimate. TR 532. He also stated that although he had no problem with Roszman's basic qualifications, Hayward Tyler did not have an in-house level 3 visual examiner and their contracted level 3 examiner was not certified for visual examinations. TR 533. He explained that in order to be certified as a level 2 visual examiner, Roszman's qualifications had to be evaluated by a level 3 examiner. TR 584. Talbot testified that he discussed this with Roszman who told him that Hayward Tyler had appointed a Walter Sperko as their level 3 visual examiner and that Sperko had reviewed his qualifications and certified him as a level 2 visual examiner. TR 533. Talbot pointed out to Roszman that Sperko had not been properly appointed as the level 3 examiner because he had not gone through Hayward Tyler's training requirements, and Roszman agreed that he had misinterpreted the requirements. TR 533-534.[4] To correct this error, Talbot testified that Roszman arranged with Hayward Tyler's contractor for level 3 LP examinations to have someone appointed as a level 3 visual examiner, and that individual eventually reviewed Roszman's qualifications for certification as a level 2 visual examiner. TR 533-534. Talbot stated that the issues that he and Doherty raised were not resolved immediately as the corrective steps that Hayward Tyler was required to take required "a certain amount of time just because they would have to review the [contractor] person's level three qualifications, then appoint him as their level three and then he could in turn review the Hayward Tyler personnel records." TR 534, 542-543. Talbot testified that the issue of Roszman's certification as a level 2 visual welding examiner was eventually resolved to his satisfaction, but there was no proper documentation that Roszman's qualifications had been evaluated by a level 3 examiner at the time that Doherty raised his concerns. TR 572, 584-585. He also stated that during the summer of 2000, a number of

[4] Walter Sperko testified at a deposition that he was appointed as Hayward Tyler's level 3 welding examiner on June 27, 2000. CX 13 at 6. He said that sometime during the summer of 2000, he was provided with Hayward Tyler's procedures on qualification and certification of welding examiners, as well as Roszman's resume and work experience, and he found Roszman's qualifications made him suitable to be a level 2 visual examiner. *Id.* at 13-14, 19. However, he also testified that Roszman had never worked under his supervision, that he never certified Roszman as a level 2 visual welding examiner and that he was not aware of any evidence that Roszman had one month of on-the-job training under the supervision of a level 3 examiner as required by QIP 11. *Id.* at18-21. Roszman testified that he could not recall Talbot ever telling him that Speko's appointment as the level 3 visual examiner was not done properly. TR 669.

"key personnel" left Hayward Tyler or were let go, generating some ill feelings among remaining employees because everything took longer to get done, a situation which later abated when the workload for nuclear projects declined with the completion of a large contract for pumps that were shipped to Korea. TR 553, 579.

Talbot further testified that he had another conversation with Doherty during this time frame in which Doherty mentioned that he had looked at some welds which appeared to have cracks and that he felt that as the only remaining quality inspector, he should be looking at welding work even though he was not formally trained as a visual examiner. TR 537. According to Doherty, his concerns about cracked welds led to a confrontation in which Eric LaRock, Provencher's replacement as Hayward Tyler's welding supervisor, cursed at him on the shop floor. TR 391-392.[5] Talbot said that he discussed some basic welding inspection concepts with Doherty and told him that cracks in welds were not acceptable. TR 537. He also showed Doherty what to look for in terms of welding defects on a subsequent visit to Hayward Tyler. TR 393, 538.

D. The August 10, 2000 Base Plate Incident and Doherty's Termination

On Thursday, August 10, 2000, Doherty was instructed by Roszman to do a dimensional inspection on some components of an eight pump order that was in the final stages of preparation for shipment to a customer. Some of these parts had left the welding area and were ready for Doherty's inspection, and others were still in the welding area. Doherty went into the welding area to check on the progress of the remaining components, and LaRock pointed to one that he said was completed. Doherty testified that he looked at the component and noticed some defects in a base plate which he told LaRock would be rejected by Talbot when he did his inspection. At LaRock's suggestion, he marked the areas in question with a piece of soapstone and told LaRock that he would not have to write up a NCR as the component had not formally been presented for inspection and could be corrected by the shop as "in-process" work. TR 397-398. Later in the day, when he was checking back in the welding shop to see if the work had been completed so that he could do his inspection, he was confronted by Roszman who had seen the marks he had placed on the base plate. Doherty testified that Roszman was very agitated and ordered him with profanity to keep away from inspecting welds. TR 398. Doherty then left the welding area to report the incident to Smith. TR 398, 401-406; 677-679; 976-979.

A hour or two after the incident with Roszman, Doherty said that he was called into Smith's office where he met with Smith and Fregeau. After he related his version of events,

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[5] Doherty testified that the confrontation with LaRock occurred in Talbot's presence when he asked Talbot whether cracks were acceptable, and Talbot responded in front of LaRock and Roszman that they were not. TR 391-392. Talbot's recollection was that this conversation with Doherty regarding cracks took place over the telephone, and he said that when he later examined the welds in question, he saw no cracks and was unsure whether they had been repaired or never existed. TR 538, 573.

Smith responded that Roszman had a different version. TR 399. Doherty then asked Smith to have Roszman join the meeting, and Roszman was summoned to provide his account. Doherty testified that Smith then told him, "You're not a team player. You're trying to hold things up." TR 399. Doherty said that he was "flabbergasted" by Smith's response, and he told Smith that he took offense at the charge that he is not a team player as he felt that he was doing his job and trying to help the company. TR 399-400.

After the meeting with Smith, Doherty wrote a letter about the incident to Fregeau, Hayward Tyler's personnel administrator, and he delivered the letter when he next returned to Hayward Tyler on August 14, 2000. CX 10. Doherty testified that he also called the NRC on August 10, 2000 to file a complaint against Hayward Tyler. TR 403-404. He was out of work on Friday, August 11, 2000 due to a previously scheduled vacation day. When he returned to work on Monday, August 14, 2000, he was given a termination letter which was effective immediately. TR 401-406. The letter, which is dated "August 2000" and signed by Fregeau, gives no reason for the termination and contains a handwritten notation dated August 14, 2000 that Doherty would receive two weeks additional pay "in lieu of notice." CX 11.

Talbot testified that he came into Hayward Tyler at about the same time that Doherty was terminated and conducted a thorough inspection of the base plates in question and did not find any cracks, but he did discover some areas that needed rework. The noted defects were corrected during his visit. TR 541-542. Roszman testified that he never looked at the weld areas on the base plates that Doherty had marked for rework, but he agreed that Talbot had required the areas to be reworked. TR 865-866.

In another letter dated August 14, 2000, Hayward Tyler offered Doherty's quality control inspector position to Michael J. Badger with a proposed starting date of August 21, 2000. RX 31. Hayward Tyler introduced a copy of an employment application from Badger which is marked as received on August 1, 2000. RX 30.

E. Hayward Tyler's Stated Reasons for Terminating Doherty's Employment

1. Testimony of Doug Roszman, Quality Control Manager

Roszman testified that he initially thought that Doherty was "all right" as an employee and was doing his job in an acceptable manner. TR 635. However, after he issued the written warning to Doherty regarding the John Crane incident in December 1999, Roszman said that there were continued problems with Doherty being uncooperative, writing up NCRs unnecessarily and generating complaints from Hayward Tyler employees that he slowed down the work and had a contentious attitude at times, which got worse through the spring/summer of 2000. TR 643-647. Regarding Doherty's attitude and lack of cooperation, Roszman stated,

> He didn't learn. He was trying to be uncooperative whatever. He challenged – he certainly challenged my certification, qualification as a visual examiner on several occasions.

TR 643. Although he acknowledged that Doherty had the right as a quality control inspector to write up NCRs, Roszman concluded that he was not acting in good faith:

> He could always write them up there comes a time when, you know, when you try to train him, like this incident, it was only a month apart and he did the same thing for exactly the same reason. You either aren't cooperating. You don't get it. You're trying to slow things down. You've got an attitude. So, legitimately he can always write them up but not trying to work to the whole company's goal, you know, he wasn't being a team player.

TR 644. Roszman conceded that he did not believe that any of these incidents were serious enough to warrant Doherty being written up or subjected to any further discipline. TR 644.

Roszman testified that Hayward Tyler was notified by its corporate parent sometime in May 2000 that it would have to lay off five employees including one in Quality Assurance. TR 653-654. Roszman decided to lay off Winton, rather than Doherty, because he needed someone to physically perform the inspections that Doherty did and because Winton made a lot more money. TR 654-655. After Winton was laid off, Roszman said that he had discussions with the management team about also getting rid of Doherty due to his uncooperative and contentious manner, and he asked the personnel administrator to bring him any applications from people with quality control experience. TR 655-656. Roszman further testified that he verbally offered Doherty's quality control inspector position to Michael J. Badger, an applicant who sent a resume to Hayward Tyler on August 1, 2000 (RX 30), during an interview on or about August 10, 2000. TR 679-683. The record shows that Hayward Tyler sent a letter to Badger on August 14, 2000, formally offering him the quality control inspector position, effective August 21, 2000. RX 31. At the time that he decided to hire Badger to replace Doherty, Roszman testified that it was his intent to terminate Doherty's employment on Friday, August 18, 2000 and to give him two weeks

pay in lieu of notice. TR 679-680. However, he said that he decided to advance Doherty's termination date to August 14, 2000 when he came into the office on August 12, 2000 to do some inspection work and discovered that a number of instruments in the Quality Assurance Lab were out of calibration; that is, he found measuring instruments which had gone beyond the dates specified in Hayward Tyler's quality assurance systems for recalibration. TR 680. He testified that he immediately informed Mark O'Bryan, the production manager, and Luke Talbot, the ANI, of the problems with the calibration because it potentially impacted on an order that was being processed and parts which Hayward Tyler had accepted in violation of its quality assurance requirements. TR 680-681. Regarding the seriousness of this problem, Roszman testified,

> I was out of control. My system was out of control. I couldn't tell what was – I knew what was past due calibration. I didn't know the impact of that out of calibration status. It – stuff had to be recalibrated. I had to get somebody in that knew what our system was and how it worked so they could tell me exactly what I needed to do to get it back in compliance and help me determine what possible impacts there were.

TR 681-682. Roszman wrote up a NCR (RX 32), and he hired an independent inspector, Joel P. Kynoch who had previously worked for Hayward Tyler as the quality control inspector prior to Doherty's employment. Kynoch checked all of the instruments and prepared a written report (RX 15). TR 682. Roszman testified that Doherty was responsible as a quality control inspector for the calibration of instruments, and he said that his discovery on August 12, 2000 that Doherty had used out of calibration instruments in inspections showed "gross negligence" on Doherty's part and was the "final straw" which convinced him that Doherty had to be terminated immediately. TR 632-634, 885-886. Roszman further testified that Doherty continued to cause Hayward Tyler problems even after he was terminated and, as evidence, he cited an October 16, 2000 fax that Doherty purportedly sent to a Hayward Tyler customer, raising questions about Hayward Tyler's products and resulting in an investigation (RX 17). TR 702-712. Finally, he testified that he made the decision to fire Doherty and that the August 10, 2000 incident involving Doherty's inspection of the welds on the base plates and Doherty's raising of safety concerns played no role in his decision. TR 674-675, 708.

On cross-examination, Roszman stated that the calibration problems that he claims to have discovered on August 12, 2000 were not a factor in his decision to terminate Doherty's employment at Hayward Tyler. TR 717. He also stated that no problems with the instruments were discovered when the calibrations were checked, and no products had to be recalled. TR 718-719. He also agreed, albeit reluctantly, that the calibration system was one of Winton's primary responsibilities and that he assumed all of Winton's responsibilities, with the exception of some "hands on" inspection duties, after Winton was laid off in June 2000. TR 720. He also agreed that Hayward Tyler's records showed that some instruments had passed recalibration dates as far back as 1996 to 1998, before Doherty was hired, yet he said that he would not have fired Winton had he discovered the calibration problems in June 2000 before Winton was laid off. TR 721, 809-810. In addition, he stated that he would not expect a quality control inspector to

perform calibration duties unless properly trained and certified for this function, and he admitted that he had never certified Doherty to perform calibration work and did not know whether Doherty was certified for calibration work. TR 812-813, 893. Regarding the John Crane incident, Roszman conceded that he had no evidence that the John Crane quality assurance engineer did not tell Doherty exactly what Doherty attributed to him in the NCR. TR 825.

2. Testimony of Dennis Smith, President and General Manager

While he could not remember specific time frames, Hayward Tyler President Smith testified that he had received some complaints about Doherty. He specifically recalled Cindy Guyette, a parts administrator, and Arnie Appel, a supervisor, complaining to him that Doherty was not inspecting items in accordance with established priorities. He also remembered Mark O'Bryan and Roszman complaining about Doherty at times in management meetings, and he testified that another supervisor, Jim Roy, complained to him that Doherty had made an inappropriate comment to a female job applicant. TR 945-961.[6]

Smith further testified that he spoke with Roszman about Doherty on numerous occasions, sometimes favorable and sometimes not, and he said that discussions about laying off either Winton or Doherty as part of a company-wide lay off and reorganization began to take place during management meetings after he returned from England following Memorial Day in 2000. He stated that although consideration was given to laying off Doherty because people had reported problems with him, Winton was ultimately selected because he did not often physically perform inspections, did not always report his findings and was disorganized. He stated that these intra-management discussions about laying off Doherty continued after Winton was laid off because Roszman said that he was disruptive and was holding up work. He also stated that Fregeau, the personnel director, was asked to look for applicants to replace Doherty in June 2000. TR 961-967. When asked about his opinion of Doherty as an employee, Smith testified,

> A. I think Dennis Doherty was very capable of doing the inspections that are called out in his job description, and I think he -- other than the calibration issue that came up at the very end of his tenure, I never doubted that Dennis Doherty could find the things that he was supposed to find in his job doing physical inspections and write them up, but he was not one of the employees that I would have preferred to have had because he was disruptive to the organization in a lot of different ways over a long period of time.

[6] This latter incident occurred in September 1999 when Doherty reportedly made comments of sexual nature to a female job applicant. Roy complained about the incident in an e-mail dated September 20, 1999 to Hayward Tyler's comptroller (RX 2), but Doherty was never disciplined, and there is no contention made by Hayward Tyler that this incident played any part in the decision to terminate his employment with the company.

Q. Did he follow direction well in your opinion?

A. Sometimes he did and sometimes he didn't. He is a very strong willed individual and when he wanted to follow directions he could, but when he -- either he wanted to be disruptive or he didn't agree with somebody, no matter how many people told him, he wouldn't follow instructions, and there were instances, like I said, that people came to me and said he wasn't following instructions on his priorities day to day and would I get involved because nobody else could seem to sort it out.

Q. And did that create a problem for Hayward Tyler?

A. Yeah. It's, you know, his -- like I said earlier, because I'm the general manager I hear a lot of things from a lot of different people, you know, I don't always know what's true and what's not true as everybody knows in organizations, you have people who don't get along, people who dislike people, but over the tenure of Dennis being there, I had had a lot of people express displeasure with his attitude. He had been in meetings which I had been in. He had been in meetings which I had chaired where he was disruptive, where his attitude was bad. He would, you know, he would harp on things that happened even before he came that we'd been told and he'd been told a number of times couldn't be changed.

TR 973-975. Smith testified that he was consulted by Roszman and did not disagree with Roszman's decision to terminate Doherty, and he said that he had known of Roszman's intention to terminate Doherty since early June 2000. TR 975. He further testified that the verbal offer to hire Badger was made prior to the August 10, 2000 incident involving the welds on the base plates. TR 976-978.

3. Documentary Evidence of Doherty's Poor Attitude and Lack of Teamwork

With the exception of the written warning issued in December 1999 (RX 1), Hayward Tyler did not offer any documentary evidence to support its position that Doherty was terminated for attitude and performance reasons that are unrelated to any activity protected by the ERA. However, Doherty introduced copies of several of his NCRs and IRs which were subsequently annotated by Roszman to reflect his criticisms of Doherty's actions. On a NCR form completed by Doherty on July 26, 2000 regarding a column bearing, Roszman inserted the following comments: "Wouldn't take instruction. Refuse to accept my input on system or QA program requirements." CX 30. On a NCR form completed by Doherty on August 3, 2000, Roszman added the following: "Dennis is not qualified to QAS-4 visual exams. I had inspected this to standard and found indications where within acceptance criteria." CX 21. On a copy of an e-mail message sent from Brian Greeley to Mark O'Bryan on August 3, 2000, regarding hydrotest water quality, Roszman wrote: "Dennis exceeded his responsibility. He was to witness hydrotest. QC

was not required to provide water quality cert. I was aware tap water more than met req't. This cause wasted efforts and $$." CX 33. On an IR form originated by Doherty on August 7, 2000 regarding thrust pad, Roszman wrote, "Dennis not qualified as a visual inspector to QAS-2. These parts met criteria. Should not have been rejected in the first place." CX 35. Roszman also made similar critical comments on an NCR report which Doherty had submitted on August 8, 2000. CX 36. All of Roszman's comments are dated August 9, 2000.

In addition to these comments on Doherty's NCRs and IRs, Roszman sent a memorandum dated August 23, 2000 to Fregeau, in which he stated, "Dennis's attitude and interaction with other Dept personnel was not constructive and working within our team oriented environment." CX 37.

## III. Findings of Fact and Conclusions of Law

A. Credibility

Because some of the key witnesses, principally Doherty and Roszman, presented conflicting testimony on material facts, the relative credibility of the witnesses is at issue. As discussed above, I find Luke Talbot to be a particularly credible and unbiased witness. He answered all questions directly and appeared to have no "axe to grind" with either party. In addition, the fact that he continues to serve as Hayward Tyler's ANI and had no negative comments to make about Hayward Tyler personnel and Hayward Tyler as a company provides me with heightened confidence in resolving any conflicts between his testimony and that of Hayward Tyler witnesses that his account is reliable. I also found Doherty and Smith to be essentially credible witnesses. However, I find that there are serious impediments to crediting much of Roszman's testimony. His lingering animosity toward Doherty for questioning his certification as the level 2 visual welding examiner was palpable from the tension in his voice when questioned by Hayward Tyler about this issue, TR 671, and he was evasive under cross examination on the same subject. TR 838-845. In addition, his repeated denials of any knowledge of NRC findings on the examiner certification and other issues simply defies credulity given his position of quality assurance manager. But most damning of all is his testimony that he discovered the calibration problem on his own on August 12, 2000 and brought the problem to the attention of Luke Talbot. TR 680-681. This claim was directly and forcefully refuted by Talbot who testified that no one informed him of the problem and that he discovered it on his own during routine monitoring that he was required to do at Hayward Tyler. TR 574, 581.[7] In view of the significance of this event, and noting especially Roszman's testimony that he was furious when he allegedly discovered the

[7] In this regard, Talbot testified that during his routine monitoring at Hayward Tyler, "I chose to monitor the calibration portion of the manual. It was probably just luck that I picked a particular item that we use for testing that had, in fact, expired its certification." TR 581-582. He further testified that after he found one instrument out of calibration, he went looking for others which resulted in his placing a hold on final documentation for some products until such time as the affected instruments could be sent out to a test lab for calibration. TR 575-576, 582.

calibration problem, I conclude that there is no innocent explanation, no excusable lapse of memory. Rather, I credit Talbot's account and consequently conclude that Roszman's testimony was knowingly false which, in my view, completely eviscerates his credibility as a witness in this case.

B. Analytical Framework

After a hearing on the merits, an ERA complainant first must prove by a preponderance of the evidence that protected conduct or activity was a "contributing factor" in causing an unfavorable personnel action. 42 U.S.C. § 5851(b)(3)(A); 29 C.F.R. § 24.7(b); *Gutierrez v. Regents of the University of California,* ARB No. 99-116, ALJ No. 1998-ERA-19, slip op. at 5 (ARB Nov. 13, 2002) (*Gutierrez*); *Paynes v. Gulf States Utilities Co.*, ARB No. 98-045, ALJ No. 1993-ERA-47, slip. op. at 4 (ARB Aug. 31, 1999). If a complainant successfully proves that his protected activity was a contributing factor, the respondent must then demonstrate "by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior." 42 U.S.C. § 5851(b)(3)(D); *Gutierrez*, slip op. at 5.

C. Doherty's Protected Activity

In a claim of retaliation or discrimination arising under the ERA, the complainant must demonstrate that he or she participated in protected activity which furthers the purpose of the ERA. 42 U.S.C. § 5851(a) (1); 29 C.F.R. § 24.2. Doherty alleges that he engaged in the following protected activities while employed by Hayward Tyler: (1) writing up NCRs; (2) raising safety concerns about the level 2 examiner; (3) identifying welds on the base plates as needing rework on August 10, 2000; and (4) filing a complaint with the NRC. Complainant's Post -Trial Memorandum at 1-4. Hayward Tyler does not dispute Doherty's assertion that he engaged in conduct protected by the ERA. Respondent's Closing Argument at 2-3. The 1992 amendments to the ERA made it clear that internal safety complaints are protected. *Reynolds v. Northeast Nuclear Energy Co.*, ARB No. 96-034, ALJ No. 1994-ERA-47, slip op. at 2 (ARB Mar. 31, 1997). Accordingly, I find that Doherty's writing up of NCRs, even though he engaged in this activity as a part of his official duties as a quality control inspector, are protected by the ERA. *See Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984) (*Mackowiak*) (ERA's employee protection provision extends to quality control inspectors for internal safety and quality control complaints). I also find that Doherty's expressed concerns over Roszman's appointment as Hayward Tyler's certified level 2 visual welding examiner and his identification of areas requiring rework on the base plates are both protected by the ERA as they related to the integrity of the nuclear quality assurance process and the quality and safety of nuclear power components. Moreover, his concerns in both instances were validated by Luke Talbot, the ANI, who agreed that the level 2 and level 3 visual examiners had not been properly certified and that the welds on the base places were in need of reworking. Finally, I find that Doherty's actions in filing a complaint with the NRC constitutes protected activity. 42 U.S.C. § 5851(a)(1).

D. Nexus between Doherty's Protected Activity and Termination of Employment

There is no question that Doherty was subjected to an adverse employment action when his employment was terminated on August 14, 2000. As discussed above, he must additionally prove by a preponderance of the evidence that his protected activity was a contributing factor to Hayward Tyler's decision to terminate his employment. In determining whether a complainant has carried this burden, temporal proximity between the protected activity and the adverse action is an important consideration. *Overall v. Tennessee Valley Authority*, ARB No. 98-111, ALJ No. 1997-ERA-53, slip. op. at 15-22 (ARB Apr. 30, 2001) (*Overall*), *aff'd sub nom Tennessee Valley Authority v. United States Secretary of Labor*, 59 Fed. Appx. 732, No. 01-3724 (6th Cir. Mar. 6, 2003). In view of Smith's credible testimony that intra-management discussions of replacing Doherty began after Memorial Day 2000 when he returned from a trip faced with a corporate edict to reduce staff and that Roszman's decision to look for another quality control inspector and to discharge Doherty were made in June 2000, I find that Doherty's actions on August 10, 2000 when he identified defects in the base plates and later called the NRC to file a complaint did not contribute to the decision that had already been made to terminate his employment. On the other hand, Doherty wrote up NCRs throughout the course of his employment and was even disciplined in December 1999 in connection with the John Crane NCR, and his voicing of concerns about the level 2 visual welding inspector situation occurred during the same time frame that Roszman, according to Smith's testimony, decided to terminate his employment because he was disruptive and holding up work. Although Smith's testimony appears to place Roszman's termination decision in the early part of June 2000, he was not specific with dates, and there is no documentary evidence such as minutes of management meetings in the record to confirm that the decision was in fact made prior to the time that Doherty expressed concern with the visual welding examiner situation. Since both events clearly occurred in close proximity to each other, and in view of Roszman's obvious irritation with Doherty's pursuit of the examiner issue and the absence of any evidence of any other conduct by Doherty in this particular time frame that would fit Roszman's allegation that he was being disruptive and holding up work, I find that it is more likely than not that the NCRs and welding examiner issue both contributed to Roszman's termination decision. Accordingly, I conclude that Doherty has successfully carried his burden of proving that he engaged in activity protected by the ERA and that his protected activity was a contributing factor in Hayward Tyler's decision to terminate his employment.

E. Articulation of Legitimate, Nondiscriminatory Reasons for Doherty's Termination

Hayward Tyler advances three reasons for Doherty's termination which, it contends, are legitimate and unrelated to any activity protected by the ERA: (1) Doherty's work performance deteriorated; (2) Doherty was a trouble-maker and failed to follow instructions and be a team player; and (3) Doherty was grossly negligent and reckless in using of non-calibrated equipment. TR 592. None of these asserted reasons stands up to scrutiny.

With regard to the first reason, Hayward Tyler presented no reliable, objective evidence that Doherty's work performance as a quality control inspector deteriorated. Smith described

Doherty as capable and competent. His assessment is confirmed by the fact that Roszman approved a pay raise in February 2000 and decided to retain Doherty instead of Winton when the company laid off personnel in June 2000.

Hayward Tyler did introduce a significant amount of evidence in support of its allegation that Doherty had a bad attitude and was a trouble maker who refused to follow instructions and be a team player, but this evidence is problematic for Hayward Tyler because the cited examples of Doherty's alleged deficiencies in these areas all invariably involve his writing NCRs and IRs which I have found to be protected by the ERA. I recognize that there is testimony from Hayward Tyler manager Mark O'Bryan that it is his opinion that Doherty intentionally abused the quality assurance system by writing up minor defects, TR 932-933, and that there clearly is a point where an employee's conduct becomes sufficiently egregious and unacceptable so as to lose statutory protection. *See Mackowiak,* 735 F.2d at 1163 (while ERA prevents discrimination against competent and aggressive quality control inspectors, it does not require an employer to retain an "abrasive, insolent, and arrogant" employee). However, I am not persuaded that Doherty came anywhere close to crossing the line into the type of misconduct that is unprotected.

Initially, I note that Roszman testified that, with the exception of the John Crane incident, he did not consider any of Doherty's alleged transgressions to be sufficiently serious to warrant further discipline or even being written up. Indeed, even the John Crane incident is revealing in that Doherty was reprimanded because he contacted the vendor and did not accept Roszman's representation that the vendor had the CMTRs on file. As Winton and Truso testified, and Roszman reluctantly admitted, contacting a vendor to resolve questions about documentation was one of Doherty's important duties. When Doherty contacted the vendor and was informed that there were no CMTRs for the parts in question, he wrote up a NCR which directly contradicted Roszman's statement about the CMTRs being on file. Roszman later revised his position to state that CMTRs were not required, and he disciplined Doherty for challenging his authority and causing an imbroglio which, in no small part, was a product of his own inaccurate statement that John Crane had CMTRs on file. In my view, Roszman's response to this incident by disciplining Doherty was disproportionate and indicative of a hostility toward protected activity.

Additionally, the fact that Doherty was not further warned or disciplined for his alleged attitudinal shortcomings takes on heightened significance in light of Hayward Tyler's maintenance of a progressive discipline policy in its Employee Handbook which provides the following four step "normal sequence" for disciplinary action: (1) an oral or written counseling session; (2) a written warning entered in the employee's work record; (3) suspension or unpaid layoff ranging from a few days to a few weeks; and (4) discharge. RX 3a.[8] Hayward Tyler's disciplinary policy also states that "[d]isciplinary action generally will be corrective in nature and termination by discharge will result only when the extreme seriousness of a single offense, or prior attempts at corrective discipline, indicate an employee's unfitness for continued employment with HTI." *Id.*

[8] Doherty was provided with a copy of the Employee Handbook at the time that he was hired. RX 3b.

It is clear from the evidence and essentially undisputed by Hayward Tyler that it did not follow its disciplinary procedures with respect to Doherty, and no argument has been advanced that Doherty engaged in such serious misconduct that an exemption from the normal corrective discipline sequence was warranted. In this regard, it is again noted that Roszman stated that the complaints about Doherty were not serious enough to even document in writing. TR 638-653. Precedent developed under the anti-discrimination provisions of the National Labor Relations Act, which is relevant to interpretations of the Federal environmental whistleblower protection statutes including the NLRA; *see* S. Rep. No. 414, 92d Cong., 2d Sess. 80-81 (1972), *reprinted in* 1972 U.S.C. C.A.N. 3668, 3748-49; *Ewald v. Commonwealth of Virginia,* ALJ No. 1989-SDW-1, slip op. at 8, n.10 (Sec'y Apr. 20, 1995); *DeFord v. Secretary of Labor,* 700 F.2d 281, 285 (6th Cir. 1983); an employer's failure to follow its own progressive discipline policy is frequently indicative of a hidden, unlawful motive for imposing more severe discipline. *See Fayette Cotton Mill*, 245 NLRB 428, 429 (1979); *Keller Mfg. Co.*, 237 NLRB 712, 713-17 (1978); *Taylor Bros., Inc.*, 230 NLRB 861, 868 (1977). In the circumstances of this case, I find that Hayward Tyler's failure to employ further corrective discipline in response to Doherty's alleged attitude problems and lack of team spirit following the issuance of the December 16, 1999 written warning creates an inference that the decision to terminate Doherty's employment was not motivated by legitimate disciplinary or performance considerations, but rather by a desire to rid the company of a troublesome employee who, contrary to Roszman's wishes, persisted in engaging in protected activity by raising safety concerns through NCRs and his questioning of Hayward Tyler's visual welding examiner certifications.[9]

Hayward Tyler's remaining reason for discharging Doherty or, more precisely, for accelerating his termination, is Roszman's charge that he was grossly negligent and in violation of quality assurance requirements by using instruments that were out of date for recalibration. Roszman's lack of credibility on how the calibration problems were "discovered" has already been discussed. For similar reasons, I also discredit his testimony that he never discussed calibration

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[9] In finding that Hayward Tyler did not follow its progressive discipline procedure and did not further warn or discipline Doherty for attitude or performance deficiencies, I have given no weight to the series of NCRs on which Roszman penned critiques under the date of August 9, 2000. There is no evidence that any of these criticisms were ever discussed with Doherty, and the timing of Roszman's comments (*i.e.*, conveniently dated one day prior to Roszman's profanity-laced outburst at Doherty for marking welding defects on the base plates) in addition to the problems with Roszman's credibility and his demonstrated hostility toward Doherty's protected activity, raises a strong inference that the annotated NCRs represent an opportunistic *ex post facto* attempt to create a pretext to mask the true reason for Doherty's discharge. In a similar vein, I note that Roszman, in his zeal to portray Doherty as an insubordinate troublemaker, testified that he found out that Doherty was telling people to do rework when "if there were real problems they should have been documented on an NCR if it was still in-process." TR 472. Ironically, Roszman is finding fault with Doherty for doing what he had been instructed to do in Roszman's April 28, 2000 e-mail message which stated that NCRs and IRs should not be used if rework was not expected to take much time. RX 16

with Doherty and never told him to do the best that he could with out of calibration instruments. Instead, I specifically credit Doherty's testimony that he told Roszman shortly after the latter assumed Winton's responsibilities that instruments were out of calibration, TR 409-411, 454-455, and I note that his account is consistent with Luke Talbot's testimony that Doherty and Winton both complained to him that there were instruments that needed to be sent out as they were past due for recalibration, and nothing had been done. TR 581.[10] Equally troubling is Roszman's extraordinary testimony that he would not have terminated Winton had he "discovered" the situation earlier and that he held Doherty entirely culpable for the calibration fiasco even though maintenance of the calibration system was Winton's and, later, his responsibility and even though he admitted that he did not know whether Doherty had ever been certified to do calibration. On these facts, the conclusion is inescapable that the negligent calibration charge is a canard put before the court to hide the true reasons for Doherty's discharge.

Based on the foregoing analysis and findings, I find that Hayward Tyler has not shown by clear and convincing evidence that it had legitimate, nondiscriminatory reasons for terminating Doherty's employment. Indeed, the rejection of Hayward Tyler's proffered reasons in combination with the finding that Roszman provided false and misleading testimony regarding the calibration issue, permits a finding of intentional and unlawful discrimination. *See Overall*, slip op. at 13; *see also Reeves v. Sanderson Plumbing Products, Inc*., 530 U.S. 133, 146-148 (2000) (fact finder may construe a party's dishonesty about a material fact as affirmative evidence of guilt); *St. Mary's Honor Center v. Hicks*, 450 U.S. 502, 511 (1993) ("fact finder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination.").

F. Conclusion

Since Doherty has established that he engaged in activity protected by the ERA and that such activity was a contributing factor in his termination, and since Hayward Tyler's has not met its burden of producing clear and convincing evidence that it had legitimate, nondiscriminatory reasons for discharging him, I conclude that he had proved that Hayward Tyler terminated his employment in violation of the ERA's employee protection provision.

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[10] It is noted that Hayward Tyler attempted to establish during cross examination that Doherty's testimony regarding this issue and, specifically, whether he had any responsibility for calibration of instruments was inconsistent with his testimony at a pre-hearing deposition. TR 446-448. The alleged inconsistency lies in Doherty's "yes" answer to a long, multi-part question at the deposition which he revised when questioned at the hearing. TR 447. Based on my observation of Dohertys' demeanor generally as well as during this particular exchange, I find that any inconsistency is more likely attributable to an honest misunderstanding of the deposition question than any mendacity on Doherty's part.

G. Remedy

As relief, Doherty seeks reinstatement and back pay since the date of his discharge on August 14, 2000. Administrative Law Judge Exhibit ("ALJX") 6. Surprisingly, Hayward Tyler does not oppose reinstatement as a remedy in the event that Doherty is found to have prevailed in his complaint of unlawful discharge. Hayward Tyler Closing Argument at 10. Although I have serious reservations about the practicality of returning Doherty to the small shop environment at Hayward Tyler given the level of acrimony which, if anything, worsened after his discharge, "reinstatement is the presumptive remedy in wrongful discharge cases under the whistleblower statutes" unless the parties have demonstrated "the impossibility of a productive and amicable working relationship" or where reinstatement is otherwise impossible. *Hobby v. Georgia Power Co.*, ARB No. 98- 166, ALJ No. 1990-ERA-30, slip op. at 8 (ARB Feb. 9, 2001) (*Hobby*), quoting *Creekmore v. ABB Power Sys. Energy Servs., Inc.*, No. ALJ No. 1993-ERA-24, slip op. at 9 (Dep. Sec'y Feb. 14, 1996). In the absence of either party opposing reinstatement on grounds supported by objective evidence, I find that it would be inappropriate to not award reinstatement. Accordingly, I will order Hayward Tyler to offer Doherty reinstatement to his former position as a quality control inspector. 29 C.F.R. § 24.7(c)(1).

In support of his claim for back pay, Doherty introduced testimony from an expert witness, Robert L. Bancroft, Ph.D. Dr. Bancroft, an economic consultant, testified that he made projections of Doherty's future earnings and benefits at Hayward Tyler based upon his pre-termination earnings including Social Security, 401K plan and health plan contributions. TR 291-293. Based on Doherty's projected future earnings at Hayward Tyler and projections of earnings from alternate employment drawn from Doherty's actual post-termination employment, Dr. Bancroft arrived at an adjusted gross loss of earnings of $17,157 for 2000, $36,816 for 2001, $24,383 for 2002 and $18,379 for 2003. TR 293-294; CX 15a. He then added interest to arrive at a present value of the loss, and he included additional amounts necessary to cover tax liability to insure that Doherty received the present value of his loss. TR 294-297; CX 15b. This process produced a total loss of $125,858 through 2003. CX 15a.

Hayward Tyler offered no evidence in opposition to Dr. Bancroft's testimony regarding the Claimant's lost earnings. However, it contends that there is an insufficient evidentiary basis for Dr. Bancroft's projections since Doherty introduced no direct evidence of his earnings at Hayward Tyler, and it objects to his post-hearing attempt to introduce unsigned income tax returns. Respondent's Closing Argument at 8-9. It also argues that any award of back pay should be reduced appropriately by Doherty's continuing failure to mitigate his losses, as evidenced by his failed attempts at self-employment and work as an independent contractor instead of diligently searching for employment comparable to his employment at Hayward Tyler. *Id*.

A whistleblower complainant is not required to calculate the amount of back pay owed with exactitude, and any uncertainty as to what a discrimination victim would have earned but for unlawful discrimination is resolved against the wrongdoer. *See McCafferty v. Centerior Energy*,

ARB no. 96-144, ALJ No. 1996-ERA-6, slip op. at 18-19 (ARB Sept. 24, 1997); *Lederhaus v. Donald Paschen & Midwest Inspection Service, Ltd.*, ALJ No. 1991-ERA-13, slip op. at 6 (Sec'y Oct. 26, 1992). *See also EEOC v. Enterprise Ass'n Steamfitters Local No. 638*, 542 F.2d 579, 587 (2d Cir. 1976), *cert. denied*, 430 U.S. 911 (1977), quoting *Hairston v. McLean Trucking Co.*, 520 F.2d 226, 233 (4th Cir. 1975). In my view, Dr. Bancroft's projections are reasonable and consistent with well-established precedent under the ERA, and I find that they constitute substantial, uncontradicted evidence of Doherty's loss of earnings.[11] In addition, his inclusion of interest comports with the remedial purposes of the ERA, and I find that he has provided credible evidence of the tax consequences of receiving a back pay award in a lump sum to support the inclusion of a income tax enhancement. *See Doyle v. Hydro Nuclear Servs.*, ARB Nos. 99-041, 99-042 and 00-012, ALJ No. 1989-ERA-22, slip op. at 11-12, 17-20 (ARB May 17, 2000).

With regard to the mitigation argument, Hayward Tyler bears the burden of establishing that the back pay award should be reduced because Doherty did not exercise diligence in seeking and obtaining other employment. *See Hobby*, slip op. at 20. This burden is "extremely high" in that Hayward Tyler "must show that the course of conduct . . . actually followed was so deficient as to constitute an unreasonable failure to seek employment." *See Id.* at 20, quoting *EEOC v. Kallir, Phillips, Ross, Inc.*, 420 F.Supp. 919, 925 (S.D.N.Y. 1976), *aff'd* 559 F.2d 1203 (2nd Cir. 1976), *cert. denied*, 434 U.S. 920 (1977). Hayward Tyler has criticized Doherty for a failed attempt at self-employment, but it has offered no evidence that his course of conduct since his termination on August 14, 2000 amounts to an unreasonable failure to seek employment. Therefore, Hayward Tyler's failure to mitigate defense is rejected, and it will be ordered to pay the full amount of back pay, as calculated by Dr. Bancroft, through the date of tender of an offer of reinstatement.[12] *See Berkman v. U.S. Coast Guard Academy*, ARB No. 98-056, ALJ No. 1997-CAA-2 and 9, slip op. at 28 (ARB Feb. 29, 2000) (remanding case to ALJ to calculate back pay owed through tender of offer of reinstatement if immediate reinstatement possible or if immediate reinstatement was not possible through the date of final judgment of complaint).

## IV. Recommended Order

Pursuant to 29 C.F.R. § 24.7(c)(1), it is recommended that the following order be adopted as the final order of the Secretary in this matter:

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[11] In view of this finding, the issue over the admissibility of Doherty's income tax returns is moot.

[12] The amount of back pay owed for 2003 will be calculated by multiplying the daily rate of back pay for 2003 by the number of days from January 1, 2003 to the date of the offer of reinstatement. The daily rate of back pay for 2003 ($50.35) is calculated by dividing the adjusted gross loss of earnings determined by Dr. Bancroft for 2003 ($18,379) by the number of days in the year (365).

(1) Hayward Tyler, Inc. will offer the Complainant Dennis Doherty reinstatement to his former position as quality control inspector together with such terms, conditions and privileges as the Complainant would have enjoyed but for his termination on August 14, 2000; and

(2) Hayward Tyler, Inc. shall pay to the Complainant back pay in the amount of $125,828, adjusted to the date of tender of an offer of reinstatement.

**NOTICE**: This Recommended Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8 (2000), a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Order, and shall be served on all parties and on the Chief Administrative Law Judge. 29 C.F.R. § 24.8 (2000).

## V. Preliminary Order

Pursuant to 29 C.F.R. § 24.7(c)(2), the following preliminary order is entered:

(1) Hayward Tyler, Inc. will offer the Complainant Dennis Doherty reinstatement to his former position as quality control inspector together with such terms, conditions and privileges as the Complainant would have enjoyed but for his termination on August 14, 2000, and Hayward Tyler, Inc. shall pay to the Complainant back pay in the amount of $125,828, adjusted to the date of tender of an offer of reinstatement;[13] and

(2) Counsel to the Complainant shall have 30 days from the date of this decision in which to file a detailed petition for an award of attorney fees and costs, and the Respondent shall have 30 days from the date any such petition is filed to submit any objections. The fee petition and any objection should address the current status of the law on the issue raised by the Complainant at the hearing and in his brief of whether an award of attorney's fees will result in any tax liability for the Complainant.

**NOTICE:** This Preliminary Order shall constitute the preliminary order of the Secretary and shall be effective immediately whether or not a petition for review is filed with the Administrative Review Board**.** 29 C.F.R. § 24.7(c)(2).

**SO ORDERED**.

A

Daniel F. Sutton
Administrative Law Judge

Boston, Massachusetts
DFS:dmd

[13] *See* note 12, *supra*.